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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-508

GTE SYLVANIA, INCORPORATED, *ET AL.*,
Petitioners,

v.

CONSUMERS UNION OF THE
UNITED STATES, INC., *ET AL.*,
Respondents.

SUPPLEMENTAL MEMORANDUM OF RESPONDENTS CONSUMERS UNION OF THE UNITED STATES, INC., AND PUBLIC CITIZEN'S HEALTH RESEARCH GROUP IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 30, 1977

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On December 8, 1977, after respondents Consumers Union and Public Citizen's Health Research Group ("the requesters") filed their initial memorandum in opposition to the petition for certiorari, the District Court in Delaware entered summary judgment permanently enjoining the Consumer Product Safety Commission from disclosing the television accident reports sought by the requesters in this Freedom of Information Act suit. Petitioners now suggest that the change of the Delaware court injunction from preliminary to permanent compels this Court to vacate the judgment of the Court of Appeals and to direct the dismissal of the requesters' suit

in the District of Columbia for reasons of comity. Petitioners' Supplemental Brief, 1-3. In short, petitioners seek to have this Court summarily foreclose the requesters' statutory right to bring this suit under the FOIA, based on the outcome of litigation in Delaware in which they never participated and were not parties, and in which no effort has ever been made to join them under Rule 19. Requesters submit that the Delaware court order does not affect the essential issues in this case, and that there is no basis for this Court to consider this case at this time.

First, petitioners ignore the real possibility that the Delaware injunction will be overturned on appeal, either on the merits or for failure to satisfy the requirements of Rule 19. Second, petitioners overlook the fact that because the requesters were not parties to the Delaware litigation, they cannot be bound by the results of that action. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968) ("Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered.") Thus, even if all appeals in the Delaware action were concluded, the requesters could not be barred from bringing their own suit either under principles of due process, *see Hanson v. Denckla*, 357 U.S. 235, 249-50, 254-55 (1958), or the doctrines of collateral estoppel and res judicata, *see Lockport v. Citizens for Community Action*, 430 U.S. 259, 263 n.7 (1977); *Robertson v. Department of Defense*, 402 F. Supp. 1342, 1346-47 (D.D.C. 1975); *Advisory Committee Note to Rule 19*, 39 F.R.D. 89.

Nor is this a case in which principles of comity require the District of Columbia courts to defer to the Delaware court, because "the concept of comity has no application in cases like the instant one in which the two pending suits involve different parties. . . ." *Great Northern Railway Co. v. National Railroad Adjustment Board*, 422 F.2d

1187, 1193 (7th Cir. 1970); *Robertson v. Department of Defense, supra*, at 1346. None of the authorities cited at page 6 of the Brief for the Federal Respondents in Opposition stand for the proposition that under considerations of comity a litigant may be required to rely on the outcome of proceedings in a distant forum to which it is not a party.

Moreover, as the Federal Respondents point out in their Brief in Opposition, p. 7, consideration by this Court at this time would be premature. The possibility that the Federal Respondents might some day be subjected to conflicting orders is merely speculative and, significantly, not one that is of any present concern to them. Finally, it is clear that a decision by this Court that the Delaware proceeding overrides the requesters' suit in the District of Columbia would be of great moment, not only for FOIA litigation, but for a broad range of cases, and should not be made summarily as petitioners suggest.

Respectfully submitted,

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